

United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	Philip G. Reinhard	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	03 CR 50039 - 1-3	DATE	8/2/2004
CASE TITLE	United States vs. Priola		

[In the following box (a) indicate the party filing the motion, e.g., plaintiff, defendant, 3rd party plaintiff, and (b) state briefly the nature of the motion being presented.]

MOTION:

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DOCKET ENTRY:

(1)	<input type="checkbox"/>	Filed motion of [use listing in "Motion" box above.]
(2)	<input type="checkbox"/>	Brief in support of motion due _____.
(3)	<input type="checkbox"/>	Answer brief to motion due _____. Reply to answer brief due _____.
(4)	<input type="checkbox"/>	Ruling/Hearing on _____ set for _____ at _____.
(5)	<input type="checkbox"/>	Status hearing[held/continued to] [set for/re-set for] on _____ set for _____ at _____.
(6)	<input type="checkbox"/>	Pretrial conference[held/continued to] [set for/re-set for] on _____ set for _____ at _____.
(7)	<input type="checkbox"/>	Trial[set for/re-set for] on _____ at _____.
(8)	<input type="checkbox"/>	[Bench/Jury trial] [Hearing] held/continued to _____ at _____.
(9)	<input type="checkbox"/>	This case is dismissed [with/without] prejudice and without costs[by/agreement/pursuant to] <input type="checkbox"/> FRCP4(m) <input type="checkbox"/> General Rule 21 <input type="checkbox"/> FRCP41(a)(1) <input type="checkbox"/> FRCP41(a)(2).
(10)	<input checked="" type="checkbox"/>	[Other docket entry] For the reasons stated on the reverse memorandum opinion and order, the court denies the motion to dismiss for pre-indictment delay.
(11)	<input checked="" type="checkbox"/>	[For further detail see order on the reverse side of the original minute order.]

<input type="checkbox"/> No notices required, advised in open court. <input type="checkbox"/> No notices required. <input checked="" type="checkbox"/> Notices mailed by judge's staff. <input type="checkbox"/> Notified counsel by telephone. <input type="checkbox"/> Docketing to mail notices. <input type="checkbox"/> Mail AO 450 form. <input type="checkbox"/> Copy to judge/magistrate judge.	courtroom deputy's initials LC6	U.S. DISTRICT COURT 2004 AUG -2 PM 2:50 Date/time received in central Clerk's Office	number of notices	Document Number 58
			AUG 02 2004 date docketed	
			 docketing deputy initials	
			8-2-04 date mailed notice	
			 mailing deputy initials	

MEMORANDUM OPINION AND ORDER

Defendants, Philp Priola, Thomas Priola, and Lynnann Gage, have moved to dismiss the indictment based on pre-indictment delay, relying on the Due Process Clause of the Fifth Amendment and, alternatively, the Speedy Trial Clause of the Sixth Amendment.

The court rejects the Sixth Amendment claim as the Supreme Court has foreclosed that avenue under the circumstances present in this case. See United States v. Lovasco, 431 U.S. 783, 788 (1977).

As for a due process claim, which plays a limited role in protecting a defendant from "oppressive delay," a defendant must show "actual and substantial prejudice." United States v. Canoy, 38 F. 3d 893, 901 (7th Cir. 1994). The obligation to show actual and substantial prejudice is an exacting one, requiring a defendant to offer more than a "suggestion of speculative harm." Canoy, 38 F. 3d at 902. The prejudice must be concrete and substantial. Canoy, 38 F. 3d at 902. A defendant is not deprived of due process if he is only somewhat prejudiced by the lapse of time. Canoy, 38 F. 3d at 902. It is only if a defendant clears this "monumental hurdle" that the government need bring forth reasons for the delay and the court need balance the prejudice against the reasons. Canoy, 38 F. 3d at 902.

Here, defendants have not cleared the monumental hurdle of showing concrete and substantial prejudice resulting from the pre-trial delay. Their references to the loss of evidence related to certain witnesses who have either died, become incapacitated, or become temporarily unavailable, are vague at best. They have also failed to specify the absence of alternatives such as depositions or other alternative forms of evidence. Based on defendants' failure to identify actual and substantial prejudice due to pre-indictment delay, the court denies the motion to the extent it is based on the Fifth Amendment.

For the foregoing reasons, the court denies the motion to dismiss for pre-indictment delay.